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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 474

THE UNITED STATES OF AMERICA,
Appellant,

vs.

JOSEPH L. CARBONE, VINCENT DeNUNNO, JOHN STROPPARO AND WANTEE HUHTANIEMI

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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MICHAEL CARCHIA,
WALTER F. LEWIS,
Counsel for Appellee, Vincent DeNunno.

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STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

Now come the Defendants and submit the following statement, opposing the grounds and matters asserted by the Appellant, and against the jurisdiction of the Supreme Court of the United States.

The United States of America, in its prayer for appeal, claims jurisdiction by the Supreme Court to review the judgment entered in this cause by virtue of the Criminal Appeals Act, 18 U. S. C., Supp. IV, 682 and in its "Statement as to Jurisdiction", affirmatively asserts that the District Court allowed the Defendants' Motions to Dismiss based on the construction of the statute (see appellant's Statement as to Jurisdiction paragaph 2, page 6).

It is obvious from the opinion of J. Sweeney, that he followed the opinion of the Supreme Court rendered in the

case of *United States* v. *Laudani*, 320 U. S. 543, wherein guides were established in the interpretation of Sec. 1, 48 Stat. 948; 40 U. S. C. A. Sec. 276b. The District Court therefore did not construe the statute upon which the indictment was founded. Where it appears from the opinion of the District Court that its judgment was not based upon the invalidity or construction of the statute on which the indictment is founded, Supreme Court has no jurisdiction of direct appeal.

U. S. v. *Wayne Pump Co.*, 317 U. S. 200.

The District Court, by its opinion, dismissed the indictment, as a matter of law, because it did not contain sufficient allegations within the meaning of statute upon which it was predicated. The indictment appears to be drawn for the purpose of fitting in these defendants within the pockets of a cloak of a legal offense against the United States. The indictment, contains deficiencies as to pleading because nowhere does it follow the opinion of the Supreme Court rendered in the *Laudani* case, 320 U. S. 543, because the essential element "vested by the employer with power to fix and terminate the employer-employee status", is lacking.

The case of *United States* v. *Borden Co.*, 308 U. S. 188, has stated the principle that the Government may not appeal, under section 682 of U. S. C., Supp. IV, from a judgment which rests on mere deficiencies of an indictment as a pleading, as distinguished from the construction of the statute which underlies the indictment, nor will an appeal lie where the District Court considered the construction of the statute but also rested its decision on the independent ground of a defect in pleading which is not subject to examination by the Supreme Court.

"Construction of an indictment and its sufficiency merely as pleading are questions for District Court,

whose decision thereon must be accepted by Supreme Court on Government's appeal from decision based on invalidity or construction of statute underlying indictment." U. S. *v.* Hastings, 296 U. S. 188.

It was held that where construction and validity of statute constituting basis of indictment having been previously adjudicated, right to proceed directly by error from District Court to United States Supreme Court was denied.

U. S. v. *Denison* (1931), 47 F. (2d) 433, 69 App. D. C. 71.

Motion to Dismiss Appeal

The defendants move that the appeal be dismissed on the following grounds:

The Government does not present a question which is substantial. The opinion of the District Court states that these defendants were indicted previously and demurrers and motions to quash were sustained and allowed.

U. S. v. *Carbone et al.*, 56 F. Supp. 343.

That first indictment contained allegations of the substantive offense as well as allegations of conspiracy against these same defendants.

The judge of the District Court at that time suggested to counsel representing the Government that since the *Laudani* case was pending in the Supreme Court of the United States, that he join the case of these defendants in order to have the statute involved construed by the Supreme Court. Counsel for the United States, however, filed a motion to re-argue the case of these defendants, before the same District Court, setting forth in its motion the fact that a writ of certiorari was pending in the case of Laudani. This motion was not heard until after the Laudani decision was rendered by the Supreme Court of the

United States, and, in the meantime, the United States brought this indictment, alleging only a conspiracy, adding the words "that the employer would hire only those whom the defendants approved and discharge those employees whom they would suggest" and adding that they were union officials. These additions to the present indictment was an attempt to spread out a legal offense before the Supreme Court handed down its opinion in the *Laudani* case. When the opinion in the *Laudani* case was handed down by the Supreme Court, the Motions of the Defendants to Dismiss this Indictment, and the Motion of the Government for a Rehearing, were both brought forward for a hearing before the District Court. Counsel for the United States moved that the Motion for a Rehearing filed on the first indictment, after the court had sustained the demurrers and had quashed the indictment, be dismissed. The docket record indicates, as pointed out in the District Court opinion, that the demurrers were sustained and the indictment was quashed.

Following this Motion, made by counsel of the United States, and after it was allowed, Defendant's counsel argued Motions to Dismiss this indictment. Counsel for the United States opposed these motions orally and filed a Memoranda of Law.

During the oral argument by counsel for the United States, the Court stated that it was clear from the opinion rendered in the *Laudani* case that the power to fix and determine the contract of employment was an essential element in order to charge these defendants with a crime and, further, that it appeared from the allegations in the indictment that a closed-shop agreement had been entered into between the employer and these union officials for them to approve the hiring of employees and that they would discharge only those whom they would suggest.

Counsel for the United States replied, conceding that it would so appear from the opinion, that his superiors felt that this indictment was in proper shape for the Supreme Court to render a full construction of the statute. Apparently, the District Court affirmed its orally expressed thoughts in its written opinion.

Had counsel for the United States accepted the suggestion of the Judge when the first indictment was quashed "to join with the Laudani case", there would be no need of this appeal. He chose to wait until the decision was rendered by the Supreme Court in the *Laudani* case, but since the acts complained of were about to be outlawed by the statute of limitations, this indictment was procured within a few days of the expiration date of the last overt act by anticipating the possible required allegations, affecting the meaning of the words "whoever" and the words "contract of employment", so that we have, in the present indictment, the allegation of "hiring only those whom the defendants would approve", and discharging those whom they would suggest, and that the defendants were union officials. This indictment was returned a few weeks before the decision of the Supreme Court in the *Laudani* case.

The opinion of the District Court, it is charged in this appeal, grants immunity to union officials from the Kick-Back Act, but it is elementary that if the allegations as charged in this indictment could be established as a fact, local authorities could well prosecute these defendants or any union official wherever and whoever he may be for larceny from the employees or embezzlement from the union, or both.

It is, therefore, not a substantial question, requiring the attention and further interpretation of the statute involved by the Supreme Court of the United States. It is submitted that the real test is whether or not the District

Court having accepted the construction of the statute, by the Supreme Court in the *Laudani* case, refutes the contention by the Government that its appeal raises a substantial question.

The defendants, by and through their counsel, respectfully submit that their Motion to Dismiss the Appeal be allowed.

(Signed) WILLIAM M. QUADE,
Counsel for John L. Carbone,
John Stropparo, Wantee Huhtaniemi;
MICHAEL CARCHIA,
WALTER F. LEVIS,
Counsel for Vincent DiNanno.